Supreme Court, U.S.
FILED
AUG 14 2000
CLERK

(2)

No. 00-90

In The

Supreme Court of the United States

EXXON MOBIL CORPORATION, et al.,

Petitioners,

v.

GRANT BAKER et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals unanimously affirmed the district court's finding, after two evidentiary hearings, that a court security officer's remark to a single juror about putting another, obviously upset juror "out of her misery" – without any knowledge of her position on the merits or any reference to the substance of the case – was taken as nothing more than a tasteless joke that "did not introduce extraneous information into the deliberations," "was not, in context, actually coercive," and therefore "did not influence the jury's deliberations." Petitioner Exxon, however, asks this Court to set aside the jury's verdict because the court of appeals' opinion did not employ the language of "rebuttable presumption" that this Court used in two older criminal cases (involving extrinsic evidence of guilt and jury tampering), but instead followed precedent consistent with more recent decisions of this Court, which have not introduced any presumption into the process of determining whether such jury intrusions were prejudicial.

In these circumstances, Exxon would present the following question:

Was it reversible error for the courts below to determine the facts and circumstances relating to the nature and impact of the security officer's inappropriate remark, unrelated to the merits, without first positing a rebuttable presumption of prejudice?

RULE 29.6 DISCLOSURE

The parties to this case are listed at page ii of Exxon's petition. The two named corporate respondents, DEBRA LEE, Inc., and Dew Drop, Inc., have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

Affirming the district court, the court of appeals characterized the comment that is the sole subject of the petition as nothing other than "a strikingly tasteless joke" in reaction to a juror's "conspicuous emotionality, departure from the jury room, and crying," a joke that did not "involve any communication bearing on the substantive matters before the jury." Pet. App. 8a. The court of appeals thus endorsed the trial court's finding that Exxon had not been prejudiced:

> [A]fter careful review of the extensive evidentiary record and scrutiny of the district court's findings, we conclude that the district court correctly categorized the bailiff's conduct and words as an inappropriate ex parte contact with a juror that did not introduce extraneous information into the deliberations and was not, in context, actually coercive.

Pet. App. 11a. Exxon's Statement of the Case, however, argues the facts de novo, as if the two lower courts had not examined the extensive hearing record in making and affirming detailed findings of fact. Moreover, much of Exxon's Statement is devoted to overblown contentions and editorializations that are both peripheral to the "bullet remark" and, in any event, irrelevant here because they were rejected by findings of fact that Exxon does not now challenge.

Unlike Exxon's, this Statement of the Case will present the pertinent facts in a manner consistent with the findings of the two courts below. With respect to Exxon's assertions about matters other than the "bullet remark," this Statement will rely principally on the court of

appeals' opinion (Pet. App. 1a-23a) and the district court's two opinions (Order 308, attached as Supp. App. 1-25, and Amended Order 339, Pet. App. 46a-67a).[1] This Statement will, however, review the record relating to Juror Wilson's emotional condition and the trial court's careful efforts to deal sensitively with it, not because it is material here but because it is appropriate to answer Exxon's distorted effort to create the impression – at odds with the factual findings of the courts below – that there was some kind of general conspiracy to coerce Juror Wilson and thereby perpetrate a miscarriage of justice against Exxon. On the facts found by the two courts below, the result of this case would have been the same in any circuit.

A. Pertinent Events During the Trial

Trial began on May 2, 1994, and concluded on September 16, 1994, when the jury returned its punitive damages verdict against Exxon. During the three phases of trial, several court security officers (CSOs) rotated as bailiffs for the jury. SER 212:21, 279:17-280:9, 382:18,

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[1] Order 308, which followed the first hearing on Exxon's various complaints about the jury, was omitted from the appendix to the petition. The petition does, however, inexplicably reproduce both Order 339, which followed the second hearing, and Amended Order 339, which corrected certain typographical errors in the original Order 339. (Amended Order 339 includes a footnote explaining the corrections, but Exxon has omitted that note from its appendix.) This Opposition refers to the Amended Order as "Order 339."

383:10-12;[2] ER 266-267, 310. Exxon focuses on one CSO, Don Warrick. Although a new CSO, the court of appeals observed that "[h]e was experienced and much decorated, as a police officer and before that in the military." Pet. App. 4a. As the courts below noted, Warrick did have some questionable social contacts with jurors at a picnic and on other occasions during the trial, but those contacts were determined to be benign in findings that Exxon no longer challenges. *See* Pet. App. 7a, 44a. The court of appeals put the CSO's juror contacts in perspective:

> Long trials are especially vulnerable to *ex parte* contacts, because people around the courthouse get to know the jurors, and it becomes much harder for jurors and others to preserve an artificial social isolation as days stretch into weeks.

Pet. App. 10a.

At about noon on Friday, September 2, 1994, the fourth full day of the jury's punitive damage deliberations, Jurors Rita Wilson and Linda Hood came out of the jury room into the adjoining anteroom. SER 265-268. Ms. Wilson was sobbing. Supp. App. 10. CSO Warrick, who was on duty, SER 265-268, summoned the court clerk, who contacted the judge. SER 276. Ms. Hood remained with Ms. Wilson throughout this time. SER 77, 179-181. To

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[2] "SER" refers to the Supplemental Excerpts of Record filed by plaintiffs in the court below. (The remaining abbreviations in this brief will follow the conventions adopted by Exxon in its petition. *See* Pet. 4 n.1.) The complete transcript of the interview of Juror Wilson appears only in the Supplemental Excerpts of Record, SER 1-288, since Exxon included only fragments in its excerpts of record below.

the extent Warrick spoke to Ms. Wilson, he was "consoling" and "relaxed her." SER 197:9-16, 240-241; *see* SER 251-252. On being alerted to the situation, the trial judge approached Ms. Hood and Ms. Wilson, instructed them not to tell him anything about the deliberations, and had "diffuse conversation with both of them about what the problem was, and frankly learned little or nothing about what the problem was." ER 408. *See also* ER 410 ("some family difficulty with a child"). The judge promptly consulted with counsel and thereafter excused the jury for the Labor Day weekend. Supp. App. 10; ER 168, 386, 409.

The jury returned on Tuesday, September 6, 1994. ER 408. As Juror Doug Graham arrived at the courthouse that morning, CSO Warrick motioned to him. ER 302; SER 141. Referring to Juror Wilson, Warrick pulled a bullet out of his pocket (SER 320-324) or his revolver (ER 276), and wisecracked that maybe Ms. Wilson should be put out of her misery. Pet. App. 4a. Both Warrick and Graham understood that Warrick was making a joke. Pet. App. 54a; ER 303-304; SER 320, 321, 324, 345-348. The fact that Warrick made such a remark "really shook . . . up" Graham, SER 142, but he did not take the substance of the remark seriously. Pet. App. 4a; ER 276-277. Graham did not tell any other juror (with the possible exception of the foreman, who did not believe he was told) or the court about the brief conversation.[3]

A few minutes later, after all the jurors had arrived, the district court gave the jury Supplemental Instruction A, a

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[3] Although Exxon suggests that other jurors became aware of the conversation, Pet. 6-7, the district court found to the contrary. Pet. App. 54a.

variation on an Exxon-proposed instruction designed to address whatever situation might have precipitated Ms. Wilson's sobbing on the previous Friday. Supp. App. 10; SER 289-290; ER 408-409. This instruction directed the jurors to be courteous to one another and to listen carefully to and consider each other's views, but not to surrender honest convictions for the mere purpose of returning a verdict. *Id.* Several hours later, the jury sent out a note stating:

> After reviewing the Supplemental Jury Instruction No. A, the Jurors have consulted with each other and we have reached a[n] impasse.

Supp. App. 11; ER 78. The note did not suggest that further deliberations would be futile, but went on (in a passage that Exxon fails to mention when describing this event, Pet. 7) to "request further instructions from the Court at this point." *Id.*

The next morning, after consulting with counsel, the trial judge determined that an additional "very soft instruction" was appropriate. Supp. App. 12; ER 410. He shared with counsel his view "that the jury is into some tough duty, some tough time as far as what they are doing." The judge continued:

> At this time I decline to treat that note as a real statement that we are at impasse, and I choose to focus on the second sentence of the note, which really says, give us some help.

Id. Supplemental Instruction B thus advised the jury that "[g]iven the complexity and duration of this case, as well as the divergence of positions between the parties, it is not surprising that individual jurors might, at this stage

of your deliberations as to Phase III [the punitive damages phase], have divergent views about the case." Supp. App. 11; SER 291-292; ER 410-411. It encouraged the jury to use the "techniques which have served you well previously" in reaching verdicts in earlier phases of the trial, to review the instructions and the evidence, and to "be as leisurely in your deliberation as the occasion may require." *Id.*

The jury proceeded with its sixth full day of punitive damages deliberations. While the jury was deliberating, Juror Wilson's husband visited the trial judge to express concerns about her emotional health. ER 171; SER 255:5-256:13, 309. Mr. Wilson said nothing to suggest there had been any inappropriate communications from court personnel or anyone else. SER 233-242, 251-252.

At the close of that day's deliberations, the jury sent another note:

> We have reviewed your supplemental Jury instructions [A and B] from Tuesday, September 6th and Wednesday, September 7th. We have also reviewed the Jury instructions from Phase I, III. We have one Juror that we feel is emotionally unable to deliberate within the Jury instructions the court has provided. We have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health.

Supp. App. 13; ER 79; SER 218-219. The court again consulted with counsel. It was agreed that the next morning, the court, "with only the absolute minimum number of counsel present," would meet informally with the juror

at issue to determine "whether she is having some continuing health problem that is interfering with jury deliberations." SER 306.[4]

At the meeting, the judge read Ms. Wilson the note expressing concern about her health, told her that her husband had paid a visit to express the same concern, and advised her that she should not disclose the substance of the deliberations or how the jury stood numerically on any issue. Supp. App. 14 & n.13; SER 308-309. In the ensuing dialogue, Ms. Wilson acknowledged being "stressed out" but expressed her personal desire to continue deliberating. She asserted that "I feel really strong and I have to be there, I feel like I make a difference." Supp. App. 14-15; SER 309-10. The court then announced that it was "satisfied" that Ms. Wilson could continue deliberating, and Exxon's counsel agreed on the record. SER 310. After Ms. Wilson left, the court expressed its view "that the only problem is that there is some tough debating going on in there, and I don't see any cause for our doing anything other than let the deliberations take their course, whatever that may be at this point." Supp. App. 15; SER 311.

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[4] The foreman had identified Ms. Wilson as the juror about whom the jury had expressed concern. SER 308. (Exxon's assertion that the foreman identified Ms. Wilson as "the hold-out juror," Pet. 7, misstates the record; he identified her only as the juror who was the subject of the note. Supp. App. 16 n.14; SER 306-308.) At this time, Exxon asked the court "to consider" interviewing all of the jurors. Contrary to Exxon's statement that the court "rejected" a "request" to interview other jurors, Pet. 7, the court held that request in abeyance. SER 306-307. Exxon never renewed the request after the meeting with Ms. Wilson. *See* SER 311-314.

Ms. Wilson rejoined deliberations. Almost exactly an hour later, however, she sent a note to the court, the full text of which stated "I need to speak with you." Supp. App. 17; ER 80. The trial judge met Ms. Wilson at the jury room door, where she "in substance ask[ed] to be excused." Supp. App. 17 n.15; SER 257:1-8; ER 175. Having just been told by Ms. Wilson in the presence of counsel that she felt capable of deliberating, the judge told her that he "could do nothing further at this time beyond telling her to follow the court's instructions." Supp. App. 17; ER 80, 175; SER 257:6-7. He reported to counsel on the substance of his encounter. ER 80. Exxon requested no further action.

The jury continued deliberating for the remainder of that week and all of the following week. Neither Ms. Wilson nor her husband attempted to communicate with the court, and there was no indication of problems in the jury room. Indeed, the jury sent out several notes during this period, all of which were unexceptional and showed that the jury was going about its business. Supp. App. 21 (facts "indicative of a jury working carefully and deliberately"); SER 294-296. On Friday September 16, 1994, the thirteenth full day of deliberations and nine deliberation days after the exchange between CSO Warrick and Juror Graham that is the sole subject of Exxon's petition, the jury returned its punitive damages verdict against Exxon. ER 81; SER 315-318. The jury was polled in open court and each juror, including Ms. Wilson, affirmed that he or she agreed with the verdict. *Id.*

B. The District Court's 1995 Investigation of the Jury

On January 22, 1995, the *Anchorage Daily News* published an article about the jury's deliberations. ER 87. Relying upon the article, Exxon sought to question the jurors or have the court hold an evidentiary hearing to determine if the jury had been exposed to improper contacts or excluded evidence in a number of respects. ER 83.

On June 13 and 14, 1995, with counsel present, the court interviewed ten of the eleven jurors, Mr. Wilson, CSO Warrick and the courtroom clerk.[5] SER 1. The court asked each juror open-ended questions about whether the juror had received information regarding excluded evidence and whether there had been any attempts to interfere with the jury or inappropriate contacts from court personnel or other third persons. *Id.* Counsel were permitted to ask follow-up questions. *Id.* Juror Graham then described, for the first time, his September 6 conversation with CSO Warrick. SER 141-144. Warrick denied the conversation. SER 268-271. Mr. Wilson's testimony mentioned no threats, inappropriate communications or misconduct by CSO Warrick or anyone else. To the contrary, Mr. Wilson testified that the CSOs sometimes "were

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[5] During trial, one juror was excused for health reasons, leaving eleven. ER 386. The parties had stipulated that if jurors were excused, a unanimous verdict from the remaining jurors would be accepted, provided at least six remained. ER 10. The court decided to interview Mr. Wilson instead of Ms. Wilson because the "court has reason to believe that Mrs. Wilson's health may have been adversely affected by her jury duty. The court will not expose Mrs. Wilson to additional stress unless a more robust showing of need to do so is made." ER 118. *See also* ER 337.

trying to calm [Ms. Wilson] down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down." SER 240:15-24. In response to questioning from Exxon's counsel, Mr. Wilson affirmed that his wife never mentioned anything about communications from court personnel concerning jury deliberations. SER 251:2-252:9.

On September 6, 1995, nearly a year after the verdict, Exxon filed a motion for new trial based on information gleaned from the juror interviews. ER 136. Exxon's motion rested in part on the Warrick-Graham conversation and the district court's supplemental instructions and contacts with Ms. Wilson. ER 159-160. The court denied Exxon's motion in Order 308. *See* Supp. App. 1-25. In so doing, the district court characterized much of Exxon's factual argument concerning Ms. Wilson (some of which it repeats in its petition) as "melodrama" and "an extraordinary and exaggerated account of the events." Supp. App. 19. With respect to the bullet conversation, the court stated that it was "not convinced that the incident ever occurred," Supp. App. 22, but went on to find that "[a]ssuming *arguendo* that it did occur, the incident does not warrant a new trial," detailing its reasons for finding the comment to have been harmless under the circumstances. Supp. App. 22-24.

Judgment was entered, and Exxon appealed. ER 184, 187, 189. Exxon sought review of only one part of Order 308, *i.e.*, the rejection of its contention that the jury had been exposed to certain excluded evidence. ER 160-162.

C. The Marshals Service Personnel Investigation of CSO Warrick.

The June 16, 1995 *Anchorage Daily News* reported on the district court's jury interviews. After the district's marshal learned of the allegations concerning CSO Warrick, he contacted the U.S. Attorney's office in Anchorage, the Marshals Service Internal Affairs Division and the Office of Inspector General, all of which declined to pursue the matter but gave permission for a local investigation. SER 319-320, 326-327, 332-334. The marshal met with the trial judge and advised him that while "there wasn't anything criminal there, I still felt the CSO had violated some of our internal policies and that we were going to do our own personnel investigation on it." SER 327. He determined that, if the personnel investigation revealed a serious problem, he would brief the court on the results. SER 329-330.

A deputy marshal reviewed the jury interview transcripts and interviewed Juror Graham, the jury foreman and two other jurors, as well as CSO Warrick. In addition, both Graham and Warrick were given polygraph examinations. Graham passed his examination, while Warrick's exams were inconclusive. SER 320, 338, 349-351. When questioned further, Warrick admitted to the "bullet" conversation with Graham, stating that he had been joking and that he had never threatened or tried to intimidate anyone on the jury. ER 301-304. Both the marshal and the polygraph examiner believed this explanation.

SER 320, 345, 347-348. Nonetheless, the marshal told Warrick that because he had previously lied about the incident, he must either resign or be fired. Pet. App. 5a; SER 320, 338-340. Warrick resigned. *Id.*

In summarizing his investigation, the marshal concluded:

> Nothing in the investigation indicated that there was any cause to believe that harm was done to anyone involved in the Exxon Valdez trial, and the matter was closed following Don Warrick's resignation.

SER 320. Because the marshal concluded that Warrick's conduct had no impact on the trial, he did not report the results of his investigation to the court. SER 329:23-330:3, 342:2-5. Four months after resigning, Warrick died of a heart attack. ER 217.

D. Exxon's 1997 Rule 60(b) Motion for New Trial.

On September 23, 1997, the 364th day after entry of judgment (and more than three years after the verdict), Exxon moved for a new trial pursuant to Federal Rule of Civil Procedure 60(b)(2) on the ground of newly discovered evidence, *i.e.*, the marshal's determination that the Warrick-Graham conversation had in fact occurred. ER 192-194. The district court indicated its willingness to accept, and the Ninth Circuit granted, a remand "for the limited purpose of considering Exxon's Rule 60(b) motion (and related request for discovery)." ER 254B.

Exxon then took depositions of the marshal, the investigating deputy and the polygraph examiner, all of

whom discussed the personnel investigation in detail. SER 325-379. Exxon also deposed Ms. Wilson in the presence of the court, her husband, and her therapist. Her testimony is discussed in detail in the court of appeals' opinion (Pet. App. 12a-23a), which concluded that "she described events so unlikely, with a demeanor so extreme, that a finder of fact could reasonably conclude [as the trial court did] that she suffered [at the time of her testimony] from a condition that would distort her perceptions or recollections." Pet. App. 20a. As to the Warrick-Graham incident, Ms. Wilson asserted at some points that she knew about Warrick showing a gun to Graham, claiming Graham had told her in the presence of the jury that he could get a gun from Warrick and put her out of her misery, and that the other jurors discussed Graham's statement. SER 384:20-385:22, 404:15-405:21, 419:21-421:5. When pressed about her allegation that Graham and the other jurors discussed the bullet incident, however, she twice retreated and answered directly that she did not know about the incident. SER 406:6-10 ("I didn't know that"), 420:23-42:5 ("I didn't know anything about Don showing bullets to Doug").

The district court's Order 339 denied Exxon's motion. Based upon his observations of the jurors over their months of service, his interviews of all the jurors after the verdict, and his review of the marshal's investigation, the trial judge concluded "that Graham treated this encounter as a bad joke." Pet. App. 54a.

> [T]he court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the

> incident and that, with the possible exception of the jury foreman, the others did not learn of the incident during the time they deliberated.

Id. Accordingly, the court concluded that the incident between Graham and Warrick "was reprehensible but harmless" and that it "did not coerce a verdict." Pet. App. 54a-55a. In evaluating Ms. Wilson's testimony, the district court described in detail her appearance and behavior, Pet. App. 57a-60a, and then found that "her present memories do not reflect what really happened." Pet. App. 64a. The court specifically found that Ms. Wilson did not know about Warrick's remark during trial. Pet. App. 63a.[6] As previously noted, a unanimous panel of the court of appeals affirmed.

REASONS FOR DENYING THE PETITION

Exxon's petition presents no issue requiring this Court's consideration. The decision below is consistent with this Court's most recent decisions concerning improper contacts with jurors, and Exxon's purported

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[6] The court noted that Ms. Wilson's testimony to the contrary was "absolutely inconsistent" not only with the testimony of Graham, but also with that of all of the other jurors. Pet. App. 61a. The court concluded that Ms. Wilson likely learned of the Warrick-Graham exchange as a result of publicity after the trial was over. Pet. App. 63a; *see also* Pet. App. 13a. This is consistent with the facts that the local newspaper reported the incident both immediately after the 1995 interviews and at the time of Exxon's 1997 motion for new trial, and that Mr. Wilson kept a clippings file about the case and discussed the clippings with Ms. Wilson. SER 231:2-10, 411:7-412:3, 414:4-415:18.

conflict among the circuits regarding rebuttable presumptions involves, at most, variations in the words chosen to explain substantively similar reviews of the facts of particular situations.

Here, the district court took measured steps to confirm Ms. Wilson's ability to participate fully in the deliberations, to deal with the problems presented by her various upsets, and to assure that the verdict reflected full and fair deliberation and the free assent of all jurors. When Exxon filed its several challenges to the jury over a period of three years, the district court conducted two extensive hearings, in which every witness with potential knowledge of the events was examined under oath. Even Exxon does not fault the trial court's conduct of these inquiries or the adequacy of the record to assess the presence or absence of prejudice. Based on these hearings, the trial court twice made detailed findings, determining that the CSO's "bullet remark" – which is the sole subject of Exxon's petition – had no impact on any juror and was harmless. The court of appeals carefully reviewed the trial court's findings and the record, and it affirmed.

On the facts found by the courts below, the outcome of this case would have been no different in any other circuit. In substance, then, Exxon is asking this Court to set aside the concurrent findings of no prejudice made by the two courts below, a task that the Court consistently and properly refuses to undertake. *See Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"); *Goodman v. Lukens Steel Co.*,

482 U.S. 656, 665 (1987). In view of this Court's most recent and comprehensive reiteration of the governing principles, and given the absence of any outcome-determinative conflict among the circuits, there is no reason for the Court to revisit the subject of jury intrusions in this case.

A. The Decision Below Is Consistent with This Court's Decisions Concerning Jury Intrusions, Which Focus on the "Ultimate Inquiry" into Prejudice Rather Than Attaching Decisional Significance to Any Presumption.

This Court's decisions on jury contacts have not turned on the application of any presumption of prejudice. Instead, the Court has focused on the need for a thorough inquiry – such as that conducted here – whenever the integrity of a jury verdict has been threatened by external influences. Once that inquiry has occurred, the facts determine the outcome of the case, without reference to any presumption.

In the most recent of its jury intrusion decisions, this Court declined to attach any significance to the presence or absence of a presumption of prejudice in a federal criminal case involving improper presence of alternate jurors in the jury room after they should have been discharged. As the Court explained, "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993). In holding that the

intrusion there was not prejudicial, the Court summarized the principles of what it called " 'intrusion' jurisprudence" as follows:

> We generally have analyzed outside intrusions upon the jury for prejudicial impact. . . . A prime example is *Remmer v. United States*, 347 U.S. 227 (1954), where . . . [the Court] remanded for the District Court to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.*, at 229-230.
>
> This "intrusion" jurisprudence was summarized in *Smith v. Phillips*, 455 U.S. 209 (1982):
>
> > "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable . . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*, at 217.

Olano, 507 U.S. at 738.

The body of "intrusion jurisprudence" described in *Olano* began with *Mattox v. United States*, 146 U.S. 140 (1892), where the intrusion was of the most egregious sort. In *Mattox*, someone had read aloud to the jurors a newspaper article that praised the prosecution, described the defendant's prior trial for murder, and assessed the

strength of the evidence. 146 U.S. at 150-51. Further, the bailiff told the jurors "that this was the third person Clyde Mattox had killed." 146 U.S. at 151. On these facts, the Court required no further inquiry to assess the nature and impact of the intrusion. Instead, the Court in effect found prejudice inherent in the nature of the extraneous contacts, based solely on post-judgment affidavits submitted by the defendant. *Mattox* thus laid down no rules for hearings to examine external influences, since it ordered no hearing at all.

The need for a hearing, on the other hand, lay at the core of the Court's decisions in *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*), and *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*). In *Remmer I*, the Court remanded to the district court for a hearing to explore the circumstances and impact of an apparent attempt at jury tampering, which had been followed by an FBI investigation involving one of the jurors. In ordering a hearing on the allegation of prejudice, the Court observed that the contacts were "presumptively prejudicial" – the language upon which Exxon relies so heavily in its petition. As the Court explained in *Remmer II*, however, the remedy for such an allegation was a hearing, so the presumption could be replaced with the facts:

> It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.

350 U.S. at 379-80. On remand, the lower court held an unduly limited hearing, confining its inquiry to the nature of the FBI investigation. Accordingly, in *Remmer II*

this Court itself conducted the ultimate inquiry into the impact of the intrusion on the jury's deliberations. Without purporting to apply any presumption, the Court determined that the record made it "quite evident" that the juror had been influenced, characterizing him as "disturbed and troubled" by the events. 350 U.S. at 381. Thus, the two *Remmer* decisions held only that prejudice in the case of jury tampering will be presumed unless and until the trial court determines otherwise after a full investigation of the pertinent circumstances. Exxon in effect concedes that such an investigation occurred in this case.[7]

Between *Remmer II* and *Olano*, the Court decided three other cases involving extraneous influences on jurors, without once applying any presumption of prejudice as part of its analysis. In *Parker v. Gladden*, 385 U.S. 363 (1966), the trial court had conducted a hearing after which it found prejudice based on a bailiff's comments that the defendant was a "wicked fellow" and that any error in convicting him could be corrected by the

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[7] Since *Remmer*, the courts of appeals have considered dozens of cases involving post-trial hearings into potential jury intrusions or juror misconduct. Because of the "kaleidoscopic variety of possible problems," the lower courts uniformly recognize the need to give district judges flexibility in addressing and resolving jury intrusion issues. *See, e.g., United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990), and cases cited therein. In general, to avoid subjecting jurors "to undue impositions," *id.*, the trial court in a "*Remmer* hearing" should confine its inquiry "to only what is absolutely necessary to determine the facts with precision." *United States v. Ianniello*, 866 F.2d 540, 544 (2d Cir. 1989). As explained in the Statement, the district court here went the extra mile to determine what happened.

Supreme Court. This Court reinstated the trial court's grant of a new trial, reversing the Oregon Supreme Court, without mentioning any presumption of prejudice. In *Smith v. Phillips*, 455 U.S. 209 (1982), and *Rushen v. Spain*, 464 U.S. 114 (1983), this Court considered the results of lower court hearings (conducted as required by *Remmer I*) and determined that new trials would *not* be required. Neither case referred to any presumption of prejudice. Indeed, *Smith v. Phillips* clearly suggested the absence of a presumption, stating that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215 (citing *Remmer I*).

Thus, *Olano* is consistent with its predecessors in holding that "intrusion jurisprudence" has little to do with presumptions and far more to do with the right to a hearing in which "the ultimate inquiry" is to determine, as a factual matter, whether a jury's deliberations have been prejudiced. The approach of the courts below in this case fully satisfied that right.

B. Exxon's Purported Conflict among the Circuits Is Largely Semantic and Not Pertinent to the Outcome of This Case.

Contrary to the premise of Exxon's petition, every circuit would have reached the same conclusion after finding, as did the two courts below, that CSO Warrick's comment did not affect any juror's deliberations. Although different courts may use different language in approaching jury intrusion issues, all courts (like the courts below) engage in a fact-intensive analysis

designed to answer the "ultimate inquiry" set forth by this Court in *Olano*: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *Olano*, 507 U.S. at 739. Given the determination of the lower courts on that "ultimate inquiry" here, the presumption that Exxon advocates (and that it claims would have applied in some circuits) would have no effect on the disposition of this case. The supposed conflict is largely illusory, academic at best, and does not require this Court's attention.

1. The Supposed Conflict Makes No Difference Here Because, Based on the Facts Found by the Courts Below, Every Circuit Would Decide This Case in the Same Way.

Like the courts below in this case, all circuits follow *Remmer*'s admonition that a hearing generally is required to investigate the circumstances and impact of an improper jury contact. Even where a court formally begins with a presumption of prejudice, the point of the hearing is to replace the bare presumption with the facts necessary to make the decisive determination whether, as a factual matter, a particular intrusion has had an impact on the jury's deliberative process.

Here, the facts have been found by two lower courts and are no longer subject to debate in this Court. *See Goodman*, 482 U.S. at 665; *Graver Manufacturing*, 336 U.S. at 275. Thus, it must be taken as given that Warrick's bullet remark was both made and understood as "a tasteless joke," that it "did not adversely affect Graham's deliberations or coerce any other juror," that no other jurors, with the possible exception of the foreman, even

learned of the incident, and that the remark "did not influence the jury's deliberations."[8] Pet. App. 4a, 5a, 9a, 54a; Supp. App. 24 n.18. On these facts, there can be no serious contention that the decision in this case conflicts with any decision of any other court of appeals. Indeed, courts (including those that recognize a presumption of prejudice) have frequently denied motions for a new trial when comments have been made to or by jurors in jest, even when those comments have improperly suggested the result the jury should reach or that the jury should return a verdict quickly – neither of which happened here.[9] Exxon has cited no case where any court of appeals

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[8] In rearguing these findings, Exxon relies (as it did below) on the suggestion that Warrick's comment contained an improper *implicit* message that he was "not on Mrs. Wilson's 'side' in the jury's deliberations." Pet. 28. The district court specifically rejected Exxon's interpretation of events, noting that "neither the CSO, nor anyone else knew the opinion" of Ms. Wilson. Supp. App. 23. Further, the testimony negates Exxon's suggestion. When Exxon's counsel tried to lead Mr. Graham into saying that Warrick was "disapproving" of Mrs. Wilson, Graham responded: "Well, I really wouldn't say that. I really wouldn't say that." SER 144:1-6.

[9] Such cases from circuits that, according to Exxon, consistently apply a presumption of prejudice include *Port Terminal & Warehousing Co. v. John S. James Co.*, 695 F.2d 1328, 1340-41 (11th Cir. 1983) (purported bribe offer), *United States v. Caporale*, 806 F.2d 1487, 1502 (11th Cir. 1986) (juror told jury he received regular "reports" on case from "Mafia" friends), and *Evans v. Young*, 854 F.2d 1081, 1082-84 (7th Cir. 1988) ("Hang him"). Cases from other circuits involving misguided jokes include *United States v. DiSalvo*, 34 F.3d 1204, 1225-26 (3d Cir. 1994) (juror joked that defendant "will put his men on you"), *United States v. Armstrong*, 909 F.2d 1238, 1240, 1244 (9th Cir. 1990) ("He's guilty"), *United States v. Norton*, 700 F.2d 1072, 1076

has ordered a new trial despite finding that an intrusion had no impact on the jury's deliberations.

Whether one regards the presumption advocated by Exxon as merely operating "[i]n the absence of evidence to the contrary," *United States v. Pennell*, 737 F.2d 521, 539 (6th Cir. 1984) (Celebrezze, J., dissenting), so as to affect only the burden of going forward with the evidence, *see, e.g.*, Fed. R. Evid. 301 (presumptions in civil cases affect only the burden of going forward), or the burden of persuasion, *see, e.g.*, *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996),[10] any presumption would have been dispelled by the evidentiary inquiry and subsequent factual findings of the two courts below. The outcome of this case thus would not be affected by refinement of the circumstances, if any, under which a presumption of prejudice might apply prior to the entry of factual findings on a full evidentiary record.

(6th Cir. 1983) ("Just be sure you make the right choice"), *United States v. Pecora*, 693 F.2d 421, 424-25 (5th Cir. 1982) (prank call), *United States v. Albert*, 595 F.2d 283, 290 (5th Cir. 1979) ("It shouldn't take you long to reach a verdict"), and *DeRonde v. State*, 715 P.2d 84, 86 (Okla. Ct. App. 1986) ("you know they're guilty or they wouldn't be there").

[10] Even where a trial court applies an erroneous burden of persuasion, an appellate court will reverse only if the evidence is "in sufficient balance so that the outcome would depend on who had the burden." *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993). Here, the emphatic findings of the two courts below make clear that the evidence was *not* in balance.

2. Like This Court in *Olano*, the Circuits Have Recognized the Practical Insignificance of the Presumption Advocated by Exxon.

Whether they invoke a presumption of prejudice or not, the cases in all circuits ultimately (and properly) turn on the facts. As the D.C. Circuit has explained:

> Although often referring to *Remmer*, this court has in fact not treated the supposed "presumption" as particularly forceful, but rather has accepted the necessity of focusing on the specific facts of the alleged contact, and, as a result, has found broad discretion in the trial court to assess the effect of alleged intrusions.

United States v. Williams-Davis, 90 F.3d 490, 496-97 (D.C. Cir. 1996). *See also United States v. Armstrong*, 654 F.2d 1328, 1332 (9th Cir. 1981) ("whether or not we speak in terms of the rebuttable presumption of prejudice or the fairness of the defendants' trial, we reach the same result"). Put another way, in practice the courts of appeals heed this Court's direction to focus their inquiry not on presumptions or other legal constructs, but on the ultimate factual determination of whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict." *Olano*, 507 U.S. at 739. *See United States v. Tucker*, 137 F.3d 1016, 1030 (8th Cir. 1998) ("whether the presumption shifts the burden of proof to the government or not, the ultimate question is the same") (citing *Olano*).[11]

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[11] As Exxon concedes, some circuits that regularly invoke the *Remmer* presumption have declined to apply the presumption in some cases. Pet. 21-26 nn.7, 8, 9, and cases cited therein. *See also United States v. Gomes*, 177 F.3d 76, 83 (1st Cir.

Thus, opinions in those circuits that, according to Exxon, formally adhere to a presumption of prejudice commonly begin with a citation to *Remmer*, proceed through a recitation of the presumption, and then conclude with a fact-specific analysis in which deference to the trial court (not the existence of a presumption) plays the major role. *See, e.g., United States v. Aguirre*, 108 F.3d 1284, 1287 (10th Cir. 1997) (trial judge "uniquely able to assess the likelihood" of prejudice); *United States v. Butler*, 822 F.2d 1191, 1195-96 (D.C. Cir. 1987) (burden to dispel presumption "made less demanding by the trial judge's participation" in effort to ascertain extent of prejudice); *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (trial judge did not abuse discretion in holding jury's use of accounting text to be harmless). In most of these cases, the courts have concluded that the presumption of prejudice has been overcome on the particular facts. *See, e.g., id.*[12] Indeed, in some cases, courts applying the presumption have found it overcome based simply on evidence of the intrusion itself, without the need for further inquiry. *United States v. Day*, 830 F.2d 1099, 1104 (10th Cir. 1987) (despite presumption, "the trial court, armed only with the undisputed content of the conversation . . . had an

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1999); *United States v. De la Vega*, 913 F.2d 861, 870 (11th Cir. 1990); *United States v. Bufalino*, 576 F.2d 446, 451 (2d Cir. 1978). These variations emphasize the fact-specific nature of the ultimate inquiry in intrusion cases.

[12] *See also Schaff v. Snyder*, 190 F.3d 513 (7th Cir. 1999); *United States v. O'Brien*, 972 F.2d 12 (1st Cir. 1992); *United States v. Sanders*, 962 F.2d 660 (7th Cir. 1992); *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990); *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989); *United States v. Hornung*, 848 F.2d 1040 (10th Cir. 1988); *United States v. Wiley*, 846 F.2d 150 (2d Cir. 1988).

adequate basis to find, as a matter of law, that no prejudice resulted"); *United States v. Pessefall*, 27 F.3d 511, 515-16 (11th Cir. 1994) (no hearing required where circumstances known to district court showed no reasonable possibility of prejudice); *Evans v. Young*, 854 F.2d 1081, 1082-84 (7th Cir. 1988) (testimony of third party sufficient when combined with polling of jury to dispel prejudicial impact of "thoughtlessly poor" joke).

In the circuits that do *not* invoke a presumption of prejudice (or that invoke a presumption only in certain circumstances), serious jury intrusions receive no less scrutiny than they do in other circuits. In *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991), for example, a friend of one juror discussed the case with the juror and conveyed "strong opinions concerning the proper outcome." Although the Ninth Circuit held that no presumption of prejudice applied, because the friend had not communicated any facts concerning the case, a unanimous panel ordered a new trial. Other courts likewise have ordered new trials based on the facts, even while rejecting application of a presumption of prejudice. *See, e.g., Waldorf v. Shuta*, 3 F.3d 705 (3rd Cir. 1993) (no presumption; new trial where jury saw media report of $30 million verdict in similar case); *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992) (no presumption; new trial where jurors had extraneous knowledge from related trial).[13]

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[13] These cases refute Exxon's claim that, without a presumption, Fed. R. Evid. 606(b) would make it impossible to prove prejudice, especially where the conduct at issue is "objectively *not* likely to influence the verdict." Pet. 16-17 (emphasis in original). This Court has said that "[t]he substance of the ex parte communications and their effect on juror

Further, in some circuits where the presumption does not uniformly apply, it does arise if the court finds a likelihood that the intrusion had an effect on the deliberations, *see, e.g., United States v. Sylvester*, 143 F.3d 923, 933-34 (5th Cir. 1998), or if the intrusion falls into a particularly suspect category, *see* Pet. App. 7a-9a. Thus, because the result of the ultimate inquiry is the same whether serious jury intrusions are subject to an automatic presumption, a presumption that arises upon a showing of likely prejudice, or simply close examination, it is not surprising that several decisions have noted that, on the facts, application of a presumption of prejudice would have no impact on the disposition of the appeal.[14]

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impartiality are questions of historical fact," to which a juror may testify without running afoul of Rule 606(b). *Rushen*, 464 U.S. at 120-21 n.5. In any event, Exxon's concern makes no sense. Even *with* a presumption of prejudice, a new trial would be highly improbable in the case of an objectively non-prejudicial intrusion: as Exxon elsewhere admits, an inference of prejudice properly can be dispelled by objective evidence, sometimes without an evidentiary hearing. *See* Pet. 27 n.11. Exxon points to no case in which the presumption has been invoked to require a new trial where the intrusion was "objectively *not* likely to influence the verdict."

[14] *See, e.g., United States v. Blumyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) ("even if the presumption of prejudice had been warranted . . . the government overcame the presumption"); *United States v. Estrada*, 45 F.3d 1215, 1228 (8th Cir. 1995) (district court and court of appeals reached same conclusion using different standards); *United States v. Gilsenan*, 949 F.2d 90, 95 n.7 (3d Cir. 1991) ("even if there was such a presumption, it was rebutted by the overall facts here"); *United States v. Boylan*, 898 F.2d 230, 262 (1st Cir. 1990) ("even if a *Remmer*-type presumption had come into play, it would be overcome by cogency of the [trial court's] findings"); *United States v. Angiulo*,

The conclusion that a presumption has no outcome-determinative consequences finds further support in analysis of the forty cases that Exxon has cited to illustrate the supposed circuit split. Pet. 21-27. The courts granted a new trial due to jury issues in only ten of those cases, and not one such grant appears to have turned on the application of any presumption of prejudice. The ten include three cases from the court below, including *Maree*, thus demonstrating that the Ninth Circuit's approach to jury intrusions accommodates new trials where the facts warrant. *See United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999); *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985). *See also Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983) (cited at Pet. 15). Of the remaining seven cases, one granted a new trial despite an express finding that no presumption of prejudice applied, *Waldorf*, 3 F.3d at 710-11 n.6; two came from a circuit in which there must be an initial showing that the intrusion was "more than innocuous" before a presumption is invoked, *United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996); *Stephens v. South Atlantic Canners*, 848 F.2d 484 (4th Cir. 1988); and the remaining four came from three different circuits that generally invoke the presumption. *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984); *Mayhue v. St. Francis Hospital of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992); *United States v. Scisum*, 32 F.3d 1470 (10th Cir. 1994); *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994). Exxon's cases thus provide no empirical basis for concluding that findings on the ultimate inquiry differ depending on whether a

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897 F.2d 1169, 1184-85 (1st Cir. 1990) ("resolution of defendant's allegation does not turn on" the presumption).

court invokes a presumption of prejudice before it begins its factual analysis.

In the end, Exxon's argument that the presumption has substantive consequences rests on a single Sixth Circuit case, in which this Court denied certiorari. *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), cited at Pet. 27. But Exxon exaggerates the impact of the presumption in *Pennell*. Although the *Pennell* court did say that it would be "hard pressed to affirm" "were *Remmer*, *Ferguson* and *Stone* [two rejected Sixth Circuit cases] controlling," it based that comment largely on the fact that the Sixth Circuit cases had "exhibited a distrust of juror assurances of impartiality." 737 F.2d at 532. *Pennell* determined that this Court's decision in *Smith v. Phillips* gave it freedom to "rely upon such assurances" in ascertaining the impact of a jury intrusion, 737 F.2d at 533, and therefore found that assurances of impartiality provided by the potentially tainted jurors were dispositive. 737 F.2d at 534.

In any event, the question presented by the petition is not whether the *Pennell* court thought it was in conflict with a presumption rule. Rather, the question is whether there is a conflict as to an issue that could be dispositive of this case, and there is none. A survey of the cases shows that the circuits' varying formulations of the so-called "presumption of prejudice" make no difference in the ultimate inquiries, which turn on the facts. Accordingly, Exxon has presented no issue worthy of this Court's assertion of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

DATED: August 14, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
the EXXON VALDEZ	)	
	)	No. A89-0095-CV
This Order Relates	)	(HRH) (Consolidated)
to All Cases	)	
	)	

ORDER No. 308

Exxon's Motion for a New Trial
(Juror Misconduct and Coercion)

(Filed Feb. 20, 1996)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion for a new trial based on possible juror misconduct and coercion.[1] Plaintiffs oppose the motion[2] and Exxon has replied.[3] Exxon's request for oral argument is deemed unnecessary and is denied.[4]

Exxon moves for a new trial on Phases I and III for the following reasons:

> (a) the jury improperly considered and discussed extrinsic information relating to the convictions of Captain Hazelwood for driving under the influence of alcohol and/or the revocation or suspension of his driver's license,

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[1] Clerk's Docket No. 6448. Defendant Joseph Hazelwood joins in Exxon's motion. Clerk's Docket No. 6449.

[2] Clerk's Docket No. 6476.

[3] Clerk's Docket No. 6512.

[4] Clerk's Docket No. 6540.

despite the Court's Order No. 207 excluding all such materials from evidence;

(b) Juror Moor was improperly approached about the case by one of the commercial fishing plaintiffs;

(c) acts of intimidation were directed at several jurors;

(d) the Court's instructions and contacts with Juror Wilson, taken in context and under all the circumstances, had the effect of coercing Juror Wilson into abandoning her honest convictions;

(e) a Court Security Officer engaged in an entirely improper course of conduct by communicating with Juror Graham concerning the jury's deliberations and taking sides against Juror Wilson;

(f) Juror Dean concealed material information on *voir dire* which, had it been revealed, would have provided a basis for a challenge for cause;

(g) any or all or [sic] the foregoing grounds, taken individually or collectively, require a new trial.

Motion at 1-2.

The court will consider the arguments *seriatim*.

Extraneous Evidence

Exxon argues that the jury was exposed to extraneous prejudicial evidence of Captain Hazelwood's DUI convictions and resultant driver's license revocations.

According to the transcript of the jury hearings[5] each of the jurors interviewed testified that they were not exposed to extraneous information about Captain Hazelwood and his driving record.[6] The court is convinced that the jurors were not exposed to extraneous information about Captain Hazelwood.

The court is also convinced that the DUI information, which the court excluded from the evidence, was not a part of the evidence which came before the jury. According to the affidavit of Lois Soiffer, a legal assistant for Bogle & Gates, none of the excluded information was in either the daily trial transcripts or any exhibit admitted into evidence.

The jury was not, during the trial or deliberations, exposed to the excluded information through extraneous sources or through the evidence. It is obvious, therefore, that the jurors who testified that they knew of Hazelwood's driving record during the trial were confused.[7]

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[5] Clerk's Docket No. 6381 and No. 6383.

[6] Jury Hearing Transcript at 9-10 (Dean); 47-48 (Moor); 74-75, 81 (Provost); 97 (Garrison); 109-10, 119 (Spann); 131-32 (Graham); 158-60 (Smith); 177, 184-85 (Hood); 193-94 (Johnson) 209-10 (Murray).

[7] The jurors' knowledge of Hazelwood's driving record can be divided into three categories: (1) a few jurors were unaware of Hazelwood's driving record; (2) a few jurors were aware of Hazelwood's driving record but were uncertain about when they learned of it; and (3) a few jurors testified that they learned of Hazelwood's driving record from the evidence. As the Soiffer affidavit proves, the latter scenario is impossible. Moreover, *all* of the jurors testified that they did not learn of Hazelwood's driving record from extraneous sources. Hence, the only logical

They may have learned of Hazelwood's driving record either before or after the trial, but the jurors' testimony and Soiffer affidavit verify that they were not exposed to the excluded information during the trial.

Juror Moor

Exxon next argues that Juror Moor was improperly approached about the case by one of the commercial fishing plaintiffs. During the jury hearing, Juror Moor testified as follows:

> Q. . . . During the course of the trial, did anyone ever attempt to convey information to you about the case outside of the courtroom?
>
> A. No. I did have a young man who I later found out was a fisherman come up to me one night, this was a young man, say, *Hey, honey how we doing*, and I said, I don't know you. He went on about his business. But other than that, that's – that's the only – it was kind of a humorous thing. And he meant it to be humorous at the time, I feel.
>
> Q. Did he know that you were one of the Exxon jurors?
>
> A. He knew I was on the jury, it was well into the case. And they're people that we meet on occasion, but until that particular time I didn't realize this young man was a fisherman.
>
> Q. Oh, this was someone you knew from before?

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conclusion is that a few jurors were confused about their knowledge of Hazelwood's driving record.

> A. He's a personal friend – well, not a personal friend. I know his wife. But I guess I never really was too concerned about what he did for a living. He was delivering our papers for a while and that sort of thing.
>
> Q. Did he endeavor to convey any information?
>
> A. Never a word, and he hasn't said anything since. He hasn't contributed anything since, you know, as to what's going on.

Jury Hearing Transcript at 42 (emphasis added).

Exxon argues that the statement "Hey, honey, how we doing":

> [W]as plainly calculated to curry favor with Juror Moor and, perhaps more important, to make sure she knew that one of her friends had a financial interest in the outcome of the trial. This presumptively prejudicial error was compounded by Juror Moor's own misconduct in violating the Court's instructions . . . and failing to report the man's wrongdoing until questioned by the Court a year or so later.

Memorandum in support of motion at 10 (citations and footnotes omitted).

Exxon seeks to make much out of very little. Exxon argues that the individual who spoke to Juror Moor was a commercial fishing plaintiff or a commercial fishing class member. Juror Moor, however, simply identified that individual as a "fisherman." There is no reason to speculate that the individual was a commercial fishermen [sic], let alone a plaintiff or class member.

Exxon argues that the fisherman was "friend" who wanted to make sure that Juror Moor knew of his financial interest in the trial. Juror Moor testified that the fisherman was "*not* a personal friend," and there is no evidence that the fisherman had any interest, let alone a financial interest in the trial. Jury Hearing Transcript at 42 (emphasis added).

Exxon argues that Juror Moor committed misconduct by not reporting the fisherman's "wrongdoing" until "a year or so *later*." Memorandum in support of motion at 10 (emphasis added). Even if the fisherman had committed "wrongdoing", Juror Moor testified that she did not know he was a fisherman until "later." Jury Hearing Transcript at 42. Thus, there is nothing to suggest that Juror Moor failed to notify the court of a "wrongdoing" during the trial.

Finally, Exxon argues that the fisherman's statement "Hey, honey, how we doing" was "plainly calculated to curry favor with Juror Moor. . . . " Memorandum in support of motion at 10. Perhaps so, but not in the manner which Exxon suggests. In any event, the entire conversation was completely and utterly harmless.[8]

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[8] Exxon compares the statement made to Juror Moor with *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983), in which Rinker approached a juror as she returned to the jury room and told her that if she had any questions about the case, he would be glad to answer them for her. The situation in the case at bar simply has no comparison to *Rinker*.

Acts of Intimidation

Next, Exxon argues that acts of intimidation were directed against several jurors. According to Exxon, these acts of intimidation include dead salmon found in Juror Johnson's yard the morning after the Phase IIA verdict.

Juror Johnson testified that the fish were left in her driveway, not her yard, and she was uncertain as to when it happened. She testified that the incident occurred:

> Probably in part of Phase II, maybe. It was when they were giving fish out on the street, you know, the salmon they were giving, the free salmon, and it was like a day after that. And I thought, well, maybe they just got that for the fishing and threw it out there. There was like three of them out on my driveway and I thought if anything else happened, I'd like – you know, but that didn't scare me.

Jury Hearing Transcript at 195.

Contact with a juror invalidates a verdict "unless the harmlessness of the contact is shown." *Hobson v. Wilson*, 737 F.2d 1, 47 (D.C. Cir. 1984) (citing *Mattox v. United States*, 146 U.S. 140 (1892), *cert. denied*, 470 U.S. 1084 (1985). It cannot be determined whether anyone associated with the trial left the fish, or if they knew that Ms. Johnson was a juror. Given that the event occurred at the time when salmon was being given away, the incident was probably random and not an attempt at intimidation. Additionally, a review of the transcripts reveals that the incident had no prejudicial effect on Juror Johnson or any other juror. The court finds that the incident was harmless and not prejudicial.

The second attempt at intimidation involved fish left at the home of Juror Wilson. According to Juror Wilson's husband, a whole fish was left in the driveway and on another occasion, a fish head and tail were found in the yard. Mr. Wilson related the incident as follows:

> I'm sure if you found that – it's never happened before and you're having a trial about fish and you end up with a fish in your driveway, you've got to give some thought to maybe wonder, you know, which way are they wanting, you know, from what side is this pressure coming, but she didn't mention how she felt about it one way or the other about that.

Jury Hearing Transcript at 235-36.

The court finds that the Wilson fish incident was harmless. The fish cannot be attributed to either party, had no bearing on the merits of the case, and, according to the Jury Hearing Transcript, had no influential or prejudicial effect on Juror Wilson or any other juror.

The next attempt at intimidation involved Juror Wilson's car. Mr. Wilson testified that someone had "rummaged around" in the car and left cigarettes in the ashtray. *Id.* at 236. Mr. Wilson testified that the incident "didn't have anything to do with the trial or anything . . . " *Id.* The court finds that the incident was harmless and had no prejudicial effect on Juror Wilson or the other jurors.

Finally, Exxon argues that Juror Johnson reported "weird phone calls" and the Juror Murray felt his family was being watched. *Id.* at 200, 211.

Juror Johnson testified to nothing more than "somebody was getting weird phone calls." *Id.* at 200. She knew nothing more about the calls. The court finds that the phone calls were harmless and had no prejudicial effect on the jury.

Regarding Juror Murray's feelings that he was being watched, he testified as follows:

> Well, the only other incidences for me personally for being, I perceived it, my family under great scrutiny. I always saw people out, parked outside my home or whenever I took a walk, there were telephones. Fortunately, our kids were out of school and my wife could watch them. Otherwise I would have had a tremendous concern, them in public school, being watched. There were other people that were there that had not been there that I noticed.
>
> I live in a fairly quiet neighborhood, I know everybody. I think there was a lot of restrain [sic] on my time and mental capacity to make sure that they were not being influenced by anyone or anyone bothering them. So we had some concerns as a family how everybody was doing.

Id. at 211-12.

The court finds that the incident was harmless and had no prejudicial impact on either Juror Murray or the other jurors. If someone was watching Juror Murray, that person or persons cannot be identified with either side and the incidents did not interfere with the jury in any manner.

None of the incidents, whether taken separately or together, had the slightest effect on the jury. None of the incidents can be attributed to any person interested in the litigation and all of the incidents were harmless and were not prejudicial.[9]

Juror Wilson

Next, Exxon argues that Juror Wilson was coerced into abandoning her sincere convictions. The court will briefly discuss the relevant facts.

The trial began on May 2, 1994, and on September 2, 1995, "Juror Wilson was discovered outside the jury room 'in some emotional distress . . . obviously quite distraught . . . [and] sobbing.' " Memorandum in support of motion at 15 (citation omitted). The court then stepped into the jury room and stated to the jurors that the court "would try to take care of it after the long [Labor Day] weekend. . . . " Jury Hearing Transcript at 82.

On the Tuesday following the Labor Day weekend, the Court called the jury in and delivered Supplemental Instruction A. The text of Supplemental Instruction A is two pages long and need not be repeated here. In substance, the jury was instructed to impartially consider the evidence, to decide the case based on their own convictions, and to treat each other with common courtesy.

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[9] Exxon argues that the jurors' failure to report the incidents to the court exacerbates the resulting prejudice. The court finds, however, that incidents were so harmless and non-threatening as to make it unnecessary for the jury to report them to the court.

A few hours later, the court received a note from the jury stating:

> After reviewing the Supplemental Jury Instruction No. A. The Jurors have consulted with each other and we have reached a [sic] impasse. We request further instructions from the Court at this point.

Memorandum in Support of Motion, Exhibit B.

The court called the jury back in and delivered Supplemental Instruction B. This instruction stated in pertinent part:

> Given the complexity and duration of this case, as well as the divergence of positions between the parties, it is not surprising that individual jurors might, at this stage of your deliberations as to Phase III, have divergent views about the case. . . .
>
> . . . I suggest that you review all of my Phase III instructions and review all of the evidence which these instructions suggest will be relevant to a determination of the punitive damages issues before you. I suggest that you focus upon the issues or matters which divide you. It may very well be useful for purposes of your deliberations to review each individual matter and evaluate, to the extent possible, how each matter might affect your answer to one or the other of the two interrogatories posed as to each of the two defendants.
>
> You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel necessary.

Clerk's Docket No. 5890.

Exxon argues that Supplemental Instruction B was an *Allen* charge which coerced Juror Wilson because it omitted any reminder that jurors were to 'be nice' to one another and failed to remind the jurors that they were not to surrender their sincere convictions. According to *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981), failure to remind the jurors of their duty not to surrender their conscientiously held beliefs simply to secure a verdict, might be construed by the jurors as coercive.

Exxon's argument fails for several reasons. First, Supplemental Instruction B was not an *Allen* charge. As the court stated to counsel prior to giving the instruction, "the prudent thing to do at this point is to ignore the suggestion that there might be an impasse, to if you will, save the *Allen* chip for a later time, and see what a very soft instruction brings for us this morning." Trial Transcript, Vol. 46 at 7688, Clerk's Docket No. 5803.[10] Second, Supplemental Instruction B encouraged the jurors to review the Phase III instructions, which instructed the jurors not surrender their beliefs.[11] Third, Supplemental Instruction B was not even a "de facto *Allen* charge", *Jiminez v. Meyers*, 40 F.3d 976, 980 (9th Cir. 1993), *cert. denied*, 116 S. Ct. 63 (1995), because it did not instruct the

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[10] A typical *Allen* charge speaks specifically to the minority jurors and urges "the minority to consider the views of the majority, and ask themselves whether their own views were reasonable under the circumstances." *Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988).

[11] In any event, instructing the jury not to surrender their convictions is required only when necessary to counter-balance "excesses" in the *Allen* charge. *United States v. Mason*, 658 F.2d at 1267. *See also Jiminez v. Meyers*, 40 F.3d at 981.

jury to "work towards unanimity and the minority to reexamine its views." *Id.* (citation omitted). Fourth, the court did not elicit any progression in the voting and was unaware of which direction the jury was moving. Finally, the court did not put any pressure on the jurors to reach a verdict, but instructed the jury to deliberate "leisurely." For the above reasons, the court finds that Supplemental Instruction B did not coerce Juror Wilson.[12]

The next event regarding Juror Wilson occurred on September 7, 1994, when the jury sent the following note to the court:

> We have reviewed your supplemental Jury instructions from Tuesday, September 6th, and Wednesday, September 7th. We have also reviewed the Jury instructions from Phase I, III. We have one Juror that we feel is emotionally unable to deliberate within the Jury instructions the court has provided. We have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health.

Memorandum in support of motion, Exhibit C.

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[12] "[T]he supplemental instruction . . . in no way suggested that a verdict was necessary, nor did it suggest that the jurors should surrender conscientious positions in light of the views of other jurors. The instruction spoke more to the style rather than to the substance of the deliberations. The charge at issue here was simply not of the potentially intimidating *Allen* type. . . ." *United States v. Knight*, 58 F.3d 393, 396 (8th Cir. 1995), *cert. denied*, No. 957218, 1995 WL 761800 (U.S. Jan. 22, 1996) (citations omitted).

The above note was sent at the end of the day after Juror Wilson had left the jury room. The following morning, September 8, 1995, the court ascertained from the jury foreman that Juror Wilson was the juror referenced in the note. The court asked Juror Wilson to come to chambers where she met with counsel and the court. The court read the note to Juror Wilson and informed her that on the previous day, her husband had visited the court to express his concerns about Juror Wilson's physical health.[13] The court then stated "[w]hat I would like to know at this point is *other than how the jury stands on anything*, are you ok?" Trial Transcript, Vol. 46 at 7697 (emphasis added). Juror Wilson responded "[i]'m just stressed out." *Id.* The following exchange ensued:

> The Court: Is there any concern from outside of this case or is there –
>
> Juror Wilson: No. It's just – it's just what happens in the jury room. I've never been in this kind of position, and it's – and I'm learning something every day on how to deal with it, but I tend – my health does go to pot when I get stressed out, and people that I haven't been around me don't realize that.
>
> The Court: Our concern is whether you are going to be okay continuing these deliberations.
>
> Juror Wilson: I feel really strongly that if I wasn't there I'd feel worse.

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[13] Exxon argues that Juror Wilson was "shocked" that her husband had been to visit the court. That Juror Wilson was "shocked" was the impression of Juror Moor. Jury Hearing Transcript at 63. Neither Juror Wilson, nor her husband, expressed a similar sentiment.

The Court: That if you weren't there you'd be worse?

Juror Wilson: Yeah.

The Court: Okay. Is it – and I don't want to put words in your mouth now, but is it fair to say that you feel up to going on with the deliberations?

Juror Wilson: I feel like it's my duty to. I feel like I have to stick it out.

The Court: Will you let us know if there should come a point where you are having some kind of a health problem.

Juror Wilson: Yeah.

The Court: The last thing we want is for there to be – you know, this process must not physically or emotionally damage you; we don't want that to happen.

Juror Wilson: In some ways it's too late. I feel really strong and I have to be there, I feel like that I make a difference.

Id. at 7697-98.

Juror Wilson was sent to the jury room and the court expressed its satisfaction "that there is some tough debating going on in there, and I don't see any cause for our doing anything other than let the deliberations take their course, whatever that may be at this point." *Id.* at 7699. Regarding the meeting of jurors after Juror Wilson departed the previous day, the court stated, "[a]t this point I don't have any reason to believe that anything happened other than that this note was written after somebody, presumably Mrs. Wilson, left yesterday." *Id.*

Exxon argues that considering the totality of the circumstances, there was a clear coercive effect on Juror Wilson. Exxon argues that the jury met improperly, identified Juror Wilson as the source of its problems, and implied that a minority juror prevented a verdict. Exxon argues that Juror Wilson was singled out and the object of implicit criticism in the court's decision to interview her. Exxon argues that Juror Wilson believed that the court valued avoiding an impasse more than adherence to convictions. Exxon argues that the court approved of the jurors meeting without her and that the court endorsed the other juror's [sic] view that Juror Wilson was "the problem."[14] Memorandum in support of motion at 19.

Exxon argues that based on the totality of the circumstances, the coercive effect of the above sequence is obvious. *Lowenfield v. Phelps*, 484 U.S. at 237. In *Lowenfield*, the Court stated that a "review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court

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[14] Exxon argues that identification of Juror Wilson as a minority juror outside the privacy of deliberations is coercive itself. *Brasfield v. United States*, 272 U.S. 448 (1926); *Jordan v. United States*, 22 F.2d 966 (9th Cir. 1927). The cases upon which Exxon relies refer to situations in which the court elicits "the division of opinion among the jury." *Jordan*, 22 F.2d at 967. Even though the jury revealed that Juror Wilson was having emotional problems, the jury did not reveal any jurors' opinion. One cannot be a minority juror unless the jurors' opinions are known, and the court never inquired into how or if the jury was divided. In any event, the note regarding Juror Wilson did not suggest that her deliberations caused a deadlocked jury, rather, the note stated that she was "emotionally unable to deliberate . . . " Memorandum in support of motion, Exhibit C.

'in its context and under all the circumstances.' " *Id.* (citation omitted). Exxon has set out the factual circumstances in a dramatic flurry, yet the totality of the circumstances can be summarized as follows: The court issued two supplemental instructions which essentially encouraged the jurors to be civil towards one another and to keep working. The court investigated the jury's subsequent concern that Juror Wilson was emotionally unstable, and was satisfied that she could continue to deliberate. Nothing in the totality of the circumstances establishes that Juror Wilson was the victim of coercion.

Exxon argues that when Juror Wilson returned to deliberations, after her meeting with the court, "the majority jurors no longer felt the need to treat Juror Wilson fairly [and were surprised] that their improper effort to get rid of Juror Wilson failed." Memorandum in support of motion at 19-20 (citation omitted). Exxon's argument fails for two reasons. First, as noted above at note 13, a "majority" was never identified. Second, the jury's concerns about Juror Wilson's health should not be considered an "improper effort to get rid of [her]." Memorandum in support of motion at 20 (citation omitted).

Shortly after Juror Wilson returned to deliberations, she sent a note to the court stating, "I need to speak with you." Memorandum in support of motion, Exhibit D. The court met with Juror Wilson at the jury room door and told her that the court "could do nothing further at this time beyond telling her to follow the court's instructions." *Id.*[15] Exxon argues that the court failed to remind

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[15] At the jury hearing, the court stated that "in substance"

Juror Wilson not to abandon her convictions. However, it was unnecessary for the court to remind Juror Wilson not to abandon her convictions, because the court did not give Juror Wilson an *Allen* charge. *See supra* note 10. In any event, the court did instruct Juror Wilson to follow the court's instructions, which included an instruction not to abandon her convictions.

At this point, Exxon argues that Juror Wilson was "boxed in." Memorandum in support of motion at 20. Exxon's argument is based in the testimony of Juror Wilson's husband who stated:

> Her impression was that – that she felt somewhat penned up in all that, you know, felt, everybody does, I suppose, that a lot of your – some of your rights have been taken away and whatnot; that if she – if she chose not to come back, that they would put her in the jail downstairs and bring her up to deliberation during the day, house her down here, take her downstairs and bring her up during the day. She wouldn't have the freedom to go home at night.
>
> And that was one of her releases, her reliefs, was going home at night, so that – that was a concern. That was one of her impressions, was she would, you know, be here and she would never get out of here until the deliberations were over.

Jury Hearing Transcript at 254.

Juror Wilson asked "to be excused from the jury." Jury Hearing Transcript at 257.

Exxon argues that the court, by giving Supplemental Instruction B, "sent the message that fair treatment was secondary to avoiding an impasse." Memorandum in support of motion at 21. Exxon argues further that the court "sided with the other jurors in the view that [Juror Wilson] was the problem. . . . " *Id.* As a result, Exxon argues that Juror Wilson was afraid that she would be "locked up" and "put in jail" because she believed that the court *"required"* a verdict and did not want Juror Wilson to " 'make a difference.' " *Id.* at 21 n.21. Exxon argues that the court made it plain that Juror Wilson "would get no further help, and could not leave the jury." *Id.* at 21. Finally, Exxon argues that Juror Wilson's only "way out" was for her to sacrifice her honest convictions and to " 'join the crowd and sacrifice all her feelings [because] it was the only way she knew how to survive.' " *Id.* at 21-22 (quoting Exxon's Exhibit A at 11). Accordingly, Exxon argues that the verdict was not the result of conviction, but the product of suffering. *Arizona v. Washington*, 434 U.S. 497, 510 n.27 (1978) ("if a jury cannot agree . . . we ought not to coerce them by personal suffering, nor ought we to expose parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.") (internal quotation and citation omitted).

Exxon's melodrama is an extraordinary and exaggerated account of the events. Supplemental Instruction B simply cannot be read as sending a "message that fair treatment was secondary to avoiding an impasse." Memorandum in support of motion at 21. The instruction simply encouraged the jurors to review the previous instructions and to continue leisurely deliberations.

Exxon argues that the court "sided with the other jurors," yet nothing in the evidence lends the slightest specter of support to Exxon's extraordinary claim. *Id.* Exxon transforms Juror Wilson's impressions of the drudgery of extended jury duty to a claim that she actually feared she would be jailed for the duration. The jury, of course, was not sequestered, and Juror Wilson went home at 2:00 p.m. every afternoon and stayed home on weekends and holidays. The court does not doubt that the *Exxon* jury duty was grueling and bears a comparison to being "somewhat penned up," but the rigors of prolonged jury duty do not amount to coercion. Jury Hearing Transcript at 254. Exxon argues that the court, in meeting with Juror Wilson made it plain that she would get no further help and could not leave the jury. The court, however, simply told Juror Wilson that there was nothing it could do "at this time." Memorandum in Support of motion, Exhibit D. The court did not inform Juror Wilson that she could get no further help and could never leave the jury. Exxon argues that Juror Wilson sacrificed her honest feelings "because [i]t was the only way she knew how to survive." *Id.* at 22 (quoting Exhibit A at 11). Yet Juror Wilson stated that it was her "duty" to continue deliberating, she felt she had "to be there" and believed she could "make a difference." Trial Transcript, Vol. 46 at 7698. Moreover, after the court told Juror Wilson, on September 8, 1994, that she should review the instructions, she continued to deliberate for another six days until the jury reached its verdict.[16] The length of deliberations demonstrates a lack

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[16] Obviously, the fact that the jury continued to deliberate belies Exxon's assertion that the jury was at an impasse.

of coercion. *See United States v. Cuozzo*, 962 F.2d 945, 952 (9th Cir.), *cert. denied*, 506 U.S. 978 (1992) (deliberation of six hours following an Allen charge "was not of such short duration as to raise a suspicion of coercion.").

After Juror Wilson returned to deliberations on September 8, 1994, the jury requested further evidence and exhibits from the court. The facts of the case are indicative of a jury working carefully and deliberately in reaching its verdicts. Nothing in the record reflects that Juror Wilson or any other juror was coerced or pressured into returning the verdicts. As stated in *United States v. Knight*, 58 F.3d at 396, "[j]ury duty can be unpleasant, but difficult, one-sided debate in the jury room does not require a mistrial. '[I]ndividual jurors have no right to be released from their colleagues' efforts at persuasion.' " *Id.* (citation omitted).[17]

The court finds that Exxon's arguments regarding coercion of Juror Wilson do not provide grounds for a new trial.

Juror Graham and the Court Security Officer

Next, Exxon argues that coercive communication between a Court Security Officer (CSO) and Juror Graham requires a new trial. Juror Graham testified at the

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[17] Assuming an *Allen* charge had been given, the coercive effect is evaluated on the basis of: (1) the form of the instruction; (2) the period of deliberation following the *Allen* charge; (3) the total time of jury deliberations; and (4) any indicia of coerciveness or pressure upon the jury. *United States v. Wauneka*, 842 F.2d 1083, 1088 (9th Cir. 1988) (citation omitted). Here, all of the factors demonstrate a complete lack of coercion.

jury hearing that one morning when he arrived for deliberations, a CSO motioned to him and stated that he heard the jury was having problems with Juror Wilson. According to Juror Graham, the CSO then pulled out his gun, removed a bullet, and said "maybe if you put her out of her misery or something." Jury Hearing Transcript at 141. The CSO then acted as if he wanted Juror Graham to take the bullet. *Id.* at 142. Juror Graham was "totally freaked . . . out." *Id.* He did not believe that he told anyone except, perhaps, the jury foreman. *Id.* The CSO denied involvement in the incident. Jury Hearing Transcript at 268-69. The court is not convinced that the incident ever occurred. *Assuming arguendo* that it did occur, the incident does not warrant a new trial.

Exxon compares this case with *United States v. Maree*, 934 F.2d 196 (9th Cir. 1991), in which a juror discussed all the trial evidence with her friends who then recommended that the juror find defendant guilty. The court stated that such *ex parte* contacts warrant a new trial only if the court finds actual prejudice to the defendant. *Id.* at 201. The court found that because the juror was presented with strong and aggressive opinions about the outcome of the case, the defendant suffered actual prejudice.

Exxon argues that:

> There can be few situations where a juror is *more* "aggressively" confronted with "opinions concerning the proper outcome of [the] case," than when a court security officer calls a juror over for an *ex parte* conversation, pulls out his gun, offers the juror a bullet, and suggests to him that a minority juror should be "put out of her misery."

Reply at 19 (citations omitted).

Exxon's argument fails for two reasons. First, the CSO did not mention the case, did not mention Exxon or commercial fishermen, and did not mention recklessness or punitive damages. Simply put, the CSO did not express an opinion about the outcome of the case. Second, Exxon continues to labor under the misconception that Juror Wilson was known to be a "minority" juror. Juror Wilson was not a "minority" juror merely because she was the only juror to exhibit emotional strain. A minority juror, as noted above, is one whose opinion is different from that of the other jurors. Here, neither the CSO, nor anyone else knew the opinion of a single juror.

No one outside the jury room was ever aware of Juror Wilson's opinion, they only knew that she was very upset during the final days of deliberations. Thus, the CSO could not have "taken sides" against Juror Wilson, because he had no idea what "side" she was on. Reply at 20. The CSO did not express his opinion about the trial or deliberations, he did not actively discuss the case, and he did not present extraneous evidence to the jury. The CSO did not comment about Exxon or the commercial fishermen, he commented about a juror. If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment, but such foolishness would not warrant a new trial.[18]

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[18] Exxon compares this case to several inapplicable cases. The factual differences demonstrate why a new trial was warranted in the cited cases, but not in the case at bar. In *Parker v. Gladden*, 385 U.S. 363 (1966), in which a bailiff said to jurors, "Oh, that wicked fellow [petitioner] he's guilty . . . [i]f there is

Juror Dean

Finally, Exxon argues that a new trial is warranted because Juror Dean answered "no" to the following question on the juror questionnaire: Have you, any member of your family, or any close friend, ever had an alcohol or drug abuse problem? *See* Order No. 295 at 2 n.4, Clerk's Docket No. 6431.

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anything wrong [in finding petitioner guilty] the Supreme Court will correct it." *Id.* at 363-64. In *Parker*, it is obvious that the bailiff expressed an opinion about the case; in the case at bar, the CSO did not express his opinion.

In *People v. Hedgecock*, 51 Cal. 3d 395, 272 Cal. Rptr. 803, 795 P.2d 1260 (1990), the bailiff stated that sequestration was expensive and that jurors should reach a quick verdict. The bailiff provided alcohol to the jurors, asked one juror to take notes on what unreasonable jurors were saying, and expressed his opinion on the meaning of reasonable doubt. In *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974) , the bailiff made a comment " 'akin to an *Allen* charge' " when he told the jurors to keep deliberating until they reached a decision, without telling them not to relinquish their convictions. *Id.* at 238 (citation omitted). Similarly, in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), the marshal told the jury that the judge could make them deliberate as long as he wanted and told the jury to remember the judge's instructions. The marshal also told the jury not to expect to reach a quick verdict. In *Scott v. Commonwealth of Virginia*, 11 Va. App. 516, 399 S.E.2d 648 (1990), the bailiff made several comments about the leniency of juries in Richmond. Finally, in *State of Louisiana v. Duplissey*, 550 So.2d 590 (La. 1989) , the bailiff told the foreperson that the jurors were to show an illiterate juror how to vote.

In each of the above cases, the bailiff had a direct and prejudicial impact on deliberations. In the case at bar, however, the CSO's alleged actions were not directed toward and did not influence the jury's deliberations.

Exxon argues that Juror Dean's arrest for possession of marijuana and frequent marijuana use is proof that he had a drug abuse problem. Both Exxon and plaintiffs have submitted expert opinions on whether Juror Dean had a drug abuse problem. Exxon's expert, of course, states that Juror Dean had a serious drug problem. Plaintiff's expert, on the other hand, states that there is insufficient data to assert whether Juror Dean had a drug abuse problem.

The court finds that Juror Dean answered the question correctly. Juror Dean has never been diagnosed with a drug abuse problem and the court cannot reach a contrary conclusion based upon the experts' affidavits.

Conclusion

For the above stated reasons, Exxon's motion for a new trial is denied.[19]

DATED at Anchorage, Alaska, this 19 day of February, 1996.

/s/ H. Russel Holland
H. Russel Holland,
Chief Judge
District of Alaska

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[19] Plaintiffs' motion to strike certain statements, exhibits, and transcript citation is denied as moot. Clerk's Docket No. 6517.